

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
	)	
FIRSTENERGY SOLUTIONS CORP. et al.,	)	Case No. 18-50757
	)	(Jointly Administered)
	)	
Debtors ¹	)	Hon. Judge Alan M. Koschik
	)	
	)	
	)	
EXELON GENERATION COMPANY, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding No.
	)	
FIRSTENERGY SOLUTIONS CORP.,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Exelon Generation Company, LLC (“Exelon” or “Buyer”), through counsel, alleges the following as its Complaint for Declaratory Judgment and Injunctive Relief against Defendant FirstEnergy Solutions Corp. (“FES” or “Seller”).

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors’ address is: 341 White Pond Dr., Akron, OH 44320.

PARTIES

1. Plaintiff Exelon is a Pennsylvania limited-liability company with its principal place of business located at 300 Exelon Way, Kennett Square, Pennsylvania 19348, and registered to do business in Ohio.

2. Defendant FES is an Ohio corporation with its principal place of business located at 341 White Pond Drive, Akron, Ohio 44320. FES is a named Debtor in the above-captioned bankruptcy case, operating its business and managing its property as a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334. This adversary proceeding is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (O).

4. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408–09.

FACTUAL BACKGROUND

5. Exelon is among the nation’s largest clean-energy generators. It is the leading provider of zero-carbon nuclear energy, and it manages a large portfolio of natural gas, hydro, wind, and solar assets.

6. FES is an Ohio-based power company that generates and provides energy-related products and services to retail and wholesale customers.

7. Exelon and FES entered into an Asset Purchase Agreement dated July 9, 2018 (as amended on September 6, 2018, the “APA”) [Ex. D, Dkt. No. 908-4]² pursuant to which Exelon agreed to purchase and FES agreed to sell (the “Transaction”) certain of FES’s assets comprising its retail energy business (the “Purchased Assets”), subject to the terms and conditions of the APA,

² All docket references refer to the main case, Case No. 18-50757, unless otherwise noted. All capitalized terms not expressly defined herein are as defined in the APA.

including approval by this Court of the Bidding Procedures Order, APA, and Sale Order.

8. Pursuant to Section 7.13(a) of the APA, FES, as Seller, agreed that within three Business Days of the date of the APA, it “shall file the Bidding Procedures and Sale Motion with the Court.”

9. The Bidding Procedures and Sale Motion³ [Dkt. No. 908] sought the Court’s approval of, *inter alia*, the terms of the APA and the procedures by which FES proposed to secure other Qualified Bids for the Purchased Assets.

10. FES filed the Bidding Procedures and Sale Motion with the Court pursuant to its obligation under Section 7.13(a) of the APA, and on August 3, 2018, this Court entered the Order Approving (a) Bid Procedures, (b) Procedures for Assumption and Assignment of Certain Executory Contracts and Related Notices, (c) Notice of Auctioned Sale Hearing, and (d) Related Relief (the “Bidding Procedures Order”) [Dkt. No. 1098].

11. The Bidding Procedures Order expressly authorized FES “to enter into the [APA] with [Exelon],” subject only to final Court approval at the Sale Hearing, which is also a condition precedent to Closing under Section 9.01(c) of the APA. Dkt. No. 1098 ¶ 7. It further authorized FES “to proceed with the Sale Transaction in accordance with the Bid Procedures and . . . take any and all actions necessary or appropriate to implement the Bid Procedures in accordance with the terms thereof” and a timeline that included deadlines for bidding, objecting to the Sale Transaction, and conducting the Sale Hearing. *Id.* at ¶ 4. Accordingly, the APA is binding on FES pursuant to its terms and subject to a final Sale Order.

12. Pursuant to Section 7.13(a)(iii) the APA, FES and Exelon are obligated to “use their

³ The Motion and Order use the term “Bid Procedures,” while the APA uses the term “Bidding Procedures.”

respective commercially reasonable efforts to have . . . the Bankruptcy Court enter the Sale Order as promptly as practicable after the completion of the Auction but, in any event, no later than one hundred twenty (120) days after the date of this Agreement” (*i.e.*, November 6, 2018), and “Seller shall be responsible for making all appropriate filings relating thereto with the . . . Court.”

13. Pursuant to Section 7.01 of the APA, FES and Exelon are each obligated to “use its reasonable best efforts to promptly take or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under applicable Laws to consummate the Transaction as promptly as practicable.”

14. Pursuant to Section 11.14 of the APA, time is of the essence with respect to the Transaction.

15. Despite FES’s efforts to obtain other Qualified Bids in accordance with the Bid Procedures Order, it was unable to secure any other Qualified Bids, and therefore no Auction took place.

16. Pursuant to Paragraph 6 of the Bidding Procedures Order, in the absence of the Qualified Bids or an Auction, Exelon, the Buyer, became the Successful Bidder.

17. Pursuant to its obligation under Section 7.13(a)(iii) to secure the Sale Order with Exelon as the Buyer, FES scheduled the hearing to approve the Transaction (the “Sale Hearing”) for September 21, 2018.

18. Pursuant to the Bidding Procedures approved by the Court, the deadline to object to the Transaction was September 14, 2018. Dkt. No. 1098 ¶ 4.

19. On or about September 12, 2018, FES told Exelon that certain *ad hoc* creditor groups (the “Creditors”) requested that FES not move forward with the Sale Hearing on September 21, 2018 to allow the Creditors more time to review the proposed sale to Exelon.

20. FES then adjourned the Sale Hearing to October 12, 2018, in accordance with that certain Notice of Adjournment dated September 14, 2018 [Dkt No. 1363].

21. FES again adjourned the Sale Hearing to October 26, 2018, and told Exelon it was doing so at the request of its Creditors. *See* Notice of Adjournment dated October 2, 2018 [Dkt. No. 1487].

22. In its discussions with Exelon regarding the adjournment of the Sale Hearing, FES stated that its Creditors were attempting to develop an alternative reorganization plan that may contemplate FES retaining the Purchased Assets, which FES had agreed to sell to Exelon pursuant to the APA in accordance with the terms contained therein.

23. FES stated that its Creditors did not want FES to move forward with the Sale Hearing while they were still attempting to formulate this alternative reorganization plan.

24. FES stated that the Creditors continued to request additional time from FES to review and potentially object to the Transaction, and FES again adjourned the Sale Hearing a third time to November 5, 2018 pursuant to that certain Notice of Adjournment dated October 19, 2018 [Dkt. No. 1555].

25. FES adjourned the Sale Hearing a fourth time to November 27, 2018, pursuant to that certain Notice of Adjournment dated October 29, 2018 [Dkt. No. 1601].

26. FES most recently adjourned the Sale Hearing for the fifth time to December 17, 2018 [Dkt. No. 1736].

27. Exelon did not agree to any of the postponements of the Sale Hearing. In each instance, Exelon asked FES to move forward with the Sale Hearing and work with Exelon to prepare to do so.

28. FES's unilateral adjournments of the Sale Hearing effectively prevented FES from

securing entry of the Sale Order by the Bankruptcy Court on or before November 6, 2018 (*i.e.*, 120 days after the execution date of the Agreement) as required by Section 7.13(a)(iii) of the APA.

29. By refusing to even conduct a Sale Hearing and repeatedly adjourning it and by failing to take other commercially reasonable affirmative actions to cause a Sale Hearing to occur by November 6, 2018, FES has materially breached Section 7.13(a)(iii) of the APA by failing to use commercially reasonable efforts to have the Bankruptcy Court enter the Sale Order by November 6, 2018 and to make all appropriate filings relating to a Sale Order, particularly in light of the fact that time is of the essence under the APA.

30. By refusing to even conduct a Sale Hearing and repeatedly adjourning it and by failing to take other commercially reasonable affirmative actions to cause a Sale Hearing to occur by November 6, 2018, FES has also materially breached its obligation under Section 7.01 to “use its reasonable best efforts to promptly take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under applicable Laws to consummate the Transaction as promptly as practicable,” particularly in light of the fact that time is of the essence under the APA.

31. By letter dated November 12, 2018, counsel for Exelon declared that FES was in breach of its obligation under Section 7.13(a)(iii) of the APA to use commercially reasonable efforts to have the Sale Order entered by November 6, 2018.

32. By letter dated November 16, 2018, counsel for FES denied that FES was in breach of its obligations under the APA and further repudiated the APA by denying that it is binding on FES in any respect.

33. The Purchased Assets are unique and cannot be acquired by Buyer elsewhere. They will provide Exelon special value when combined with Exelon’s existing retail energy business,

which value cannot be quantified through a damage remedy at law.

34. In recognition of the unique value that the Purchased Assets represent to Buyer, Section 11.15 of the APA provides:

Each Party acknowledges and agrees that the other Party would be damaged irreparably if any provision of this Agreement is not performed in accordance with its specific terms or is otherwise breached. Accordingly, each Party agrees that the other Party will be entitled to obtain an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and its terms and provisions in any action instituted in the Bankruptcy Court . . . without the need to post a bond or other security, . . . in addition to any other remedy to which it may be entitled, at law or in equity.

35. Pursuant to Section 10.01(b), either party may terminate the APA “(i) if the Closing has not occurred on or before December 31, 2018 (the “End Date”) and (ii) the terminating Party shall not have breached in any material respect any of its obligations under this Agreement that would give rise to a failure of a condition to Closing set forth in Article 9.”

36. Pursuant to Section 10.01(d)(ii), Seller may terminate the APA “if any of the conditions set forth in Section 9.01 or Section 9.03 have not been satisfied as of the End Date or if the satisfaction of such a condition is or becomes impossible (other than through the failure of Seller to comply with its obligations under this Agreement) and Seller has not waived such condition on or before the End Date.”

37. If FES is not declared to be in material breach of its obligation under the APA such that it cannot exercise its right to terminate the APA under Section 10.01(b) and/or 10.01(d)(ii) and it is not enjoined from terminating the APA under Section 10.01(b) and/or 10.01(d)(ii) pending a ruling on the requested declaration, FES may purport to terminate the APA under Section 10.01(b)(i) and/or 10.01(d)(ii), in which case Exelon will be deprived of its ability to acquire the Purchased Assets or seek breakup fees.

38. Failure by FES to use commercially reasonable efforts to secure the Sale Order or

use reasonable best efforts to consummate the Transaction under these circumstances has placed Buyer in an untenable position in light of the looming End Date.

39. Under the terms of the APA, FES is in material breach of its obligation to proceed with the Sale Hearing and use reasonable best efforts to consummate the Transaction.

40. As such, immediate relief is necessary given the impending December 31, 2018 deadline.

41. Therefore, as set forth below, Exelon now seeks: (1) a judicial declaration that FES is in material breach of Section 7.13(a)(iii) of the APA through its failure to use commercially reasonable efforts to obtain a Sale Order by November 6, 2018, and that it is in material breach of Section 7.01 of the APA through its failure to use reasonable best efforts to consummate the Transaction as promptly as practicable, and it therefore cannot terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii) of the APA; and (2) injunctive relief to maintain the status quo and prevent FES from terminating the APA on grounds that the Closing did not or cannot occur by December 31, 2018.⁴

COUNT I **DECLARATORY JUDGMENT**

42. Exelon incorporates the preceding paragraphs as if expressly alleged herein.

43. “In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). As such, federal bankruptcy courts have the authority to issue declaratory judgments to settle parties’ legal

⁴ Exelon is filing a Preliminary Motion for Injunctive Relief Against FirstEnergy Solutions Corp. (“Preliminary Injunction Motion”) contemporaneously herewith, which is fully incorporated herein.

rights and remove uncertainty from legal relationships.

44. Exelon's declaration that FES is in material breach of its obligations under the APA and FES's denial of the same create an actual controversy regarding their legal rights under the APA, particularly regarding FES's right—or loss of the right—to terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii).

45. These controversies are presently justiciable, as Exelon's rights are already being violated in a way that may cause it significant irreparable harm.

46. A judicial declaration regarding such rights is both necessary and appropriate here to establish the substantive legal effect of FES's conduct under the APA with respect to the underlying Transaction. A declaratory judgment would settle these controversies, ensure that the parties' rights under the APA are protected and enforced, and prevent further litigation that might otherwise be certain to result.

47. Accordingly, Exelon is entitled to a judicial declaration that FES has failed to use commercially reasonable efforts to obtain a Sale Order by November 6, 2018, in material breach of Section 7.13(a)(iii) and that it has failed to use reasonable best efforts to consummate the Transaction as promptly as practicable in material breach of Section 7.01 of the APA such that FES cannot terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii).

COUNT II **INJUNCTIVE RELIEF**

48. Exelon incorporates the preceding paragraphs as if expressly alleged herein.

49. Exelon is entitled to injunctive relief maintaining the status quo and preventing FES from purporting to terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii) on grounds that the Closing has not occurred or cannot occur by December 31, 2018.

50. Exelon has a strong likelihood of demonstrating to this Court that FES has failed to

use commercially reasonable efforts to secure a Sale Order by November 6, 2018, in material breach of its obligation under Section 7.13(a)(iii) of the APA or use reasonable best efforts to consummate the Transaction as promptly as practicable in material breach of its obligation under Section 7.01 of the APA.

51. Not only have the parties “acknowledge[d] and agree[d]” under APA Section 11.15 “that the other Party would be damaged irreparably if any provision of [the APA] is not performed in accordance with its specific terms or is otherwise breached,” Exelon will otherwise be irreparably harmed if FES is permitted to terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii) as set forth herein because the Purchased Assets are unique assets that cannot be acquired elsewhere, and the value of the Purchased Assets when combined with Exelon’s existing retail energy business cannot be adequately quantified.

52. In addition, if FES is permitted to continue its commercially unreasonable delay past the End Date or otherwise allege that consummating the Transaction has become impossible and FES is not enjoined from exercising its purported termination rights under Sections 10.01(b) and/or 10.01(d)(ii), FES could seek to purportedly terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii) despite being in material breach of the APA and deny Buyer the opportunity to purchase the Purchased Assets.

53. Buyer, which prefers first and foremost to proceed with the Transaction, is entitled to a declaratory judgment regarding whether Seller is in material breach of the APA for failing to conduct a Sale Hearing or otherwise use reasonable best efforts to consummate the Transaction before Seller can terminate under Sections 10.01(b) and/or 10.01(d)(ii).

54. Granting the injunctive relief sought herein will not unduly prejudice FES or other parties in interest.

55. Granting the injunctive relief sought herein will not implicate the public interest, except to promote the enforcement of contractual agreements.

56. Exelon has performed each of its obligations under the APA in all material respects required to date.

57. Exelon has no adequate remedy at law that would otherwise prevent FES from terminating the APA on the above-referenced grounds.

WHEREFORE, Exelon respectfully requests that the Court:

(1) Issue a judicial declaration that FES is in material breach of Sections 7.13(a)(iii) and 7.01 of the APA through its failure to use commercially reasonable efforts to obtain a Sale Order by November 6, 2018 or use reasonable best efforts to consummate the Transaction, such that it cannot terminate the APA under Sections 10.01(b) and/or 10.01(d)(ii); and

(2) Issue the injunctive relief sought in Exelon's Preliminary Injunction Motion filed herewith to maintain the status quo and prevent FES from terminating the APA under Sections 10.01(b) and/or 10.01(d)(ii) on grounds that the Closing has not occurred or cannot occur by December 31, 2018; and

(3) Award Exelon any and all other, further, or additional relief deemed just and proper.

Dated: November 26, 2018

Respectfully submitted,

/s/ Leonard J. Marsico

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